Public Prosecutor v Por Chong Beng

HIGH COURT (PULAU PINANG) — CRIMINAL CASE NO 45-1-95
JEFFREY TAN JC
4 AUGUST 1995

Criminal Law *— Dangerous Drugs Act 1952 — s 39B — Trafficking in dangerous drugs — Statutory presumption — Weight of heroin — Whether presumption of trafficking applicable — Whether weight as calculated by chemist was proof beyond reasonable doubt — Whether court should evaluate calculation by chemist especially in borderline cases*

Criminal Procedure *— Judge — Role of trial judge — Evaluation of chemist's evidence in trial on charge of trafficking in dangerous drugs — Whether detailed evaluation necessary where weight of drug involved would decide whether the offence is a capital offence*

Evidence *— Exhibits — Identity of exhibits — Discrepancies in description of exhibits — Minor descrepancies to be expected — Effect of discrepancy in description of crucial exhibits*

The accused was charged with trafficking in 18.15g of heroin, an offence which upon conviction carries the mandatory death sentence. He had been arrested with a package wrapped in newspaper which contained plastic packets containing an orange substance. There was, however, no direct evidence of a specific drug trafficking activity. The chemist ('SP1') testified that he removed 21 samples from the blended substance and subjected each sample to the same test to determine the percentage weight by weight content of heroin in the 21 samples tested. Having determined the highest and lowest percentage weight by weight content of heroin, SP1 mathematically gave the weight of heroin in the substance recovered from the accused as 18.15g. SP1, however, admitted that if he had used the lowest percentage from the 21 samples, the weight of heroin in the substance recovered would be 16.22g. Both the figures were arrived at on the basis that the weight of the bulk substance was 72.5g as testified by the chemist. However, there was a discrepency in the weight of the bulk substance as there was a difference of 5.7g in the gross weight of the package (newspaper, plastic packets and bulk substance) given by SP1 as 75.7g and by the investigating officer ('SP4') as 70.0g. Further, there was a discrepancy in the description of the bulk substance given by the chemist, who described it as an orange substance, while the complainant described the substance recovered as brown. The discrepancies were not explained. Therefore, the key issue before the court was whether the weight as calculated by the chemist was conclusive proof that the weight of the heroin was above 15g and therefore attracted the presumption of trafficking in s 37(d) of the Dangerous Drugs Act 1952 ('the Act').

Held, amending the charge to one of possession under s 12(2) of the Act, and convicting the accused:

(1) As a chemist is a witness of fact, the probative value of a chemist's evidence must be evaluated by a trial court. Findings of fact is immutably in the court's domain, and notwithstanding the assistance of a chemist, the identity and weight of a substance said to be dangerous drugs must be the finding of a trial court and not that of a chemist. The court's evaluation of a chemist's evidence is infinitely more necessary where the weight of the drug concerned is bordering on or proximating a lesser offence. However, where the weight of the dangerous drug concerned is far above the minimal tariff for an offence, a detailed probe of (i) each and every step of the chemical analysis concerned; (ii) the actual calculation of weight of the substance; and (iii) the data for the calculations concerned, should not at all be undertaken, if, as in the case of heroin and other drugs with the same tariff, it is beyond all reasonable doubt above 15g (see p 473A–C; *PP v Ho Nee Fatt* (Penang High Court, Criminal Trial No 47–12–1991) (unreported) followed).

(2) An accused 'mathematically calculated to the gallows' should be given the benefit of the full range of possible weights (of drugs) which can be estimated or calculated based on the data obtained from the samples tested, and of the possible variations in and permutations to that mathematical calculation. However, in this case, SP1's calculation of the heroin content based on the mean value had denied the accused of a reasonable doubt that sample 17, with the lowest percentage weight by weight content, was possibly the most representative sample of the bulk substance, and the true weight of heroin was 16.22g and not 18.15g. Further, the doubt on the weight of heroin as one decidedly above 15g was not diminished, but heightened, by the inconsistent evidence on the gross weight of the package given by SP1 and SP4 which amounted to a difference of 5.7g. Therefore, upon the calculation of the weight taking into account the lowest data and the discrepancy of 5.7g, the weight of the heroin was 14.944g which was below the tariff of 15g (see p 475A–C, H–I).

(3) The discrepancy in the colour of the substance was not explained. Minor discrepancies in the evidence of witnesses even from the same side is to be expected and do not warrant an acquittal. However, in their description of crucial exhibits, even though there is no expectation that they give replica descriptions, witnesses ought to accurately describe the exhibits so as not to leave any doubt that different exhibits were involved (see p 476A–B, E; *Yeong Kia Heng v Pendakwa Raya* [1992] 1 MLJ 327 not followed; *Ng Hock Lye v PP* (Sun, 2 August 1995) followed).

(4) There was the concession of defence counsel that the heroin concerned was not less than 10g, but there were doubts that the heroin was of a weight above 15g. Therefore, the charge was amended to one under s 12(2) of the Act which was punishable under s 39A(ii) of the Act as the prosecution had made out a prima facie case of possession (see p 476F).

A **[Bahasa Malaysia summary**

Tertuduh telah dituduh mengedar dadah berbahaya iaitu heroin sebanyak 18.15g, satu kesalahan yang jika sabit akan membawa hukuman mati. Beliau telah ditangkap dengan satu bungkusan yang dibalut suratkhabar, di dalamnya terdapat bungkusan-bungkusan
B plastik yang mengandungi suatu bahan berwarna oren. Namun demikian, tidak terdapat keterangan langsung tentang satu gerakan penyeludupan dadah yang tertentu. Ahli kimia ('SP1') memberi keterangan bahawa dia telah mengambil 21 contoh daripada keseluruhan bahan itu dan melakukan ujian yang sama ke atas setiap contoh untuk memastikan peratusan berat daripada berat kandungan
C heroin di dalam 21 contoh itu. Setelah menentukan peratusan berat daripada berat kandungan heroin yang tertinggi dan terendah, dia telah secara matematik memberikan berat bahan yang dirampas daripada tertuduh sebagai 18.15g. SP1, namun demikian, mengakui bahawa jika ia menggunakan peratusan terendah daripada 21 contoh
D itu, berat heroin di dalam bahan yang dirampas itu adalah 16.22g. Kedua-dua berat tersebut didapati berdasarkan fakta bahawa berat keseluruhan bahan itu adalah 72.5g mengikut keterangan ahli kimia. Walau bagaimanapun, terdapat perbezaan dalam berat keseluruhan bahan itu kerana terdapat perbezaan 5.7g dalam berat kasar bungkusan itu (suratkhabar, bungkusan plastik dan bahan itu) yang diberi oleh
E SP1 sebagai 75.7g dan oleh pegawai penyiasatan ('SP4') sebagai 70.0g. Terdapat juga perbezaan di dalam penggambaran keseluruhan bahan yang diberi oleh ahli kimia yang menggambarkannya sebagai bahan berwarna oren manakala pengadu menggambarkannya sebagai bahan berwarna coklat. Perbezaan-perbezaan itu tidak dijelaskan.
F Maka, isu penting yang harus dipertimbangkan oleh mahkamah adalah sama ada berat yang dikira oleh ahli kimia itu adalah bukti yang tidak dapat dipertikaikan bahawa berat heroin adalah melebihi 15g, dan oleh itu menarik pemakaian anggapan pengedaran di bawah s 37(d) Akta Dadah Berbahaya 1952 ('Akta itu').

G **Diputuskan,** meminda tuduhan kepada tuduhan pemilikan di bawah s 12(2) Akta itu, dan menyabit tertuduh itu:

(1) Oleh kerana seorang ahli kimia adalah seorang saksi tentang fakta, nilai probatif keterangan ahli kimia itu mesti dipertimbangkan oleh mahkamah. Dapatan mengenai fakta adalah
H untuk ditentukan oleh mahkamah, dan walaupun terdapat pertolongan ahli kimia, identiti dan berat sesuatu bahan yang dikatakan sebagai dadah berbahaya mestilah dapatan mahkamah perbicaraan dan bukannya dapatan ahli kimia. Penilaian mahkamah mengenai keterangan ahli kimia lebih diperlukan di mana berat dadah itu bersempadan dengan atau lebih mendekati
I kesalahan yang kurang. Namun demikian, di mana berat dadah berbahaya itu jauh lebih daripada berat minima untuk kesalahan itu, penyiasatan terperinci mengenai (i) setiap langkah yang diambil dalam analisa kimia itu; (ii) pengiraan sebenar berat bahan itu; dan (iii) data yang digunakan dalam pengiraan-

pengiraan itu, tidak perlu dibuat, jika, seperti dalam kes yang berkenaan dengan heroin atau dadah lain yang mempunyai takat minima yang sama, ianya adalah melampaui keraguan munasabah lebih daripada 15g (lihat ms 473A–C; *PP v Ho Nee Fatt* (Penang High Court, Criminal Trial No 47–12–1991) (tidak dilaporkan) diikut).

(2) Seorang tertuduh yang dihukum mati melalui pengiraan matematik, mesti diberi manfaat kesemua kemungkinan berat yang ada (untuk dadah itu) yang dianggar atau dikira berdasarkan data yang diperolehi daripada contoh yang diuji, dan manfaat variasi yang mungkin wujud dalam pengiraan matematik itu. Walau bagaimanapun, di dalam kes ini pengiraan SP1 tentang kandungan heroin itu berdasarkan nilai purata telah menafikan tertuduh keraguan munasabah bahawa contoh 17, dengan peratusan berat daripada berat yang paling rendah, boleh jadi adalah contoh yang paling tepat mewakili keseluruhan bahan itu, dan berat sebenar heroin itu adalah 16.22g dan bukannya 18.15g. Tambahan pula, keraguan mengenai berat heroin sebagai melebihi 15g tidak dikurangkan, bahkan ditambahkan, dengan keterangan yang tidak konsisten mengenai berat kasar bungkusan yang diberi oleh SP1 dan SP4, iaitu perbezaan sebanyak 5.7g. Maka, di atas pengiraan berat yang mengambil kira data terendah dan perbezaan 5.7g itu, berat heroin itu adalah 14.944g yang mana adalah kurang daripada 15g (lihat ms 475A–C, H–I).

(3) Percanggahan mengenai warna bahan itu tidak diterangkan. Percanggahan yang kecil dalam keterangan saksi-saksi walaupun dari pihak yang sama memang dijangkakan dan tidak bermaksud bahawa tertuduh patut dibebaskan. Walau bagaimanapun, dalam menggambarkan eksibit yang penting, walaupun tidak diharapkan bahawa mereka memberikan gambaran yang serupa, saksi-saksi patut menggambarkan dengan setepat yang mungkin supaya tidak meninggalkan apa-apa keraguan bahawa terdapat eksibit-eksibit yang berlainan (lihat ms 476A–B, E; *Yeong Kia Heng v Pendakwa Raya* [1992] 1 MLJ 327 tidak diikut; *Ng Hock Lye v PP* (Sun, 2 Ogos 1995) diikut).

(4) Terdapat persetujuan peguam pembelaan bahawa heroin itu tidak kurang daripada 10g, tetapi terdapat keraguan bahawa heroin itu mempunyai berat melebihi 15g. Maka, pertuduhan itu ditukar kepada satu pertuduhan di bawah s 12(2) Akta itu yang boleh dihukum di bawah s 39A(ii) Akta itu kerana pendakwaan telah membuktikan kes prima facie pemilikan (lihat ms 476F).]

Notes

For cases on exhibits, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 877–895.

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26–108; [1989] Mallal's Digest 592–621; [1990] Mallal's Digest 463–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526–538; [1994]

A Mallal's Digest 849–870.

Cases referred to

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265
PP v Lin Lian Chen [1992] 2 MLJ 561
B *Munusamy v PP* [1987] 1 MLJ 492
Ng Hock Lye v PP (Sun, 2 August 1995)
PP v Ang Soon Huat [1991] 1 MLJ 1
PP v Ho Nee Fat (Penang High Court, Criminal Trial No 47–12–1991) (unreported)
PP v Lam San [1991] 3 MLJ 426
C *PP v Peter Yeoh & Anor* [1993] 1 CLJ 78
Yeong Kia Heng v Pendakwa Raya [1992] 1 MLJ 327

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 39B

D

Ranjit Singh (*R Rajasingam & Co*) for the accused.
Ishak bin Mohd Yusoff (Deputy Public Prosecutor) for the Public Prosecutor.

E **Jeffrey Tan JC**: The accused was charged with trafficking in 18.15g of heroin, an offence carrying, on conviction, the mandatory death sentence.

At the close of the prosecution case, there was no doubt whatsoever as to the primary facts of the arrest and recovery of drug exhibits from the accused, and the fact that the drug exhibits tendered in court were indeed
F the very same drug exhibits recovered from the accused at the material time. However, there was no direct evidence of a specific drug trafficking activity.

The Dangerous Drugs Act 1952 ('the DDA') provides different punishments for different amounts of drugs, and s 37(d) further provides a legal presumption of drug trafficking rather than mere possession, where
G the heroin possessed is more than 15g. The weight of heroin recovered from the accused was therefore of extreme importance.

Invariably, at some stage or other in a criminal trial, the prosecution's evidence against an accused would be evaluated against the burden and standard of proof. In the instant trial, that burden upon the prosecution
H was that it furnishes proof of each ingredient of the offence beyond all reasonable doubt, including conclusive proof that the heroin was not less than 15g.

On that weight of the heroin, one Shaharuddin bin Hassan ('SP1'), a government chemist, testified as follows. He received from the investigating
I officer ('SP4') a package wrapped in a Chinese newspaper. Inside that package were seven plastic packets each containing orange granular and powdery substance. The weight of the package (newspaper, plastic packets and substance) was 75.7g while the weight of the substance was 72.5g. Apart from rendering the now obligatory evidence on (i) the blending process to achieve the homogeneity of substance; and (ii) the qualitative and quantitative tests that identified the orange substance, SP1 testified

that the heroin was 18.15g, a weight sufficient to attract the presumption of trafficking. A

SP1 quantified the heroin content by a gas chromatography ('GC') test. He removed at random 21 samples from the blended substance and subjected each sample to the GC test, that gave him a percentage weight by weight content of heroin in the 21 samples tested. The total weight of substance used for the GC test was 0.809g, in percentage terms 1.11586%, of the total orange substance which was chemically analysed to determine the total heroin content in the balance 98.884% orange substance. B

Of the 21 data from the GC test, the highest percentage weight by weight content of heroin was 26.541%, the lowest being 24.087% and the average (mean value) was 25.422%. SP1 explained that from the 21 data, he calculated the standard deviation ('SD') which divided by the mean value (25.422%) and multiplied by 100 gave him the coefficient of variation ('CV') as 2.05%. That CV was to account for the unavoidable error inherent in the chemical analysis. The court was not provided with the formula used in the calculation of the SD, but SP1 said he calculated the SD from the 21 data, allowed for a margin of error of 0.375% for instrument error that was deducted from the mean value (25.422%). With such deduction (25.422% less 0.375%), the percentage weight by weight content of heroin in the 72.5g of orange substance was 25.047%, which multiplied by the weight of substance (72.5g) mathematically gave the weight of heroin in the total orange substance as 18.15g. C D E

SP1 also said that the low CV evinced his chemical analysis was close to the absolute and the substance tested was homogeneous. He admitted that if he had calculated on the lowest of the 21 data (data 17), the weight of heroin in the 72.5g of substance would be 16.22g.

To sum up SP1's evidence, the salient points in his evidence were: (i) on the average of 21 data (mean value), taking into account the margin of error and a CV of 2.05%, the percentage weight by weight content of heroin was 25.047% giving the weight of heroin 18.15g; (ii) on the lowest of the 21 data, and with similar allowances, the weight of heroin was 16.22g. Therefore, there was a difference of 1.93g (10.63%) between the weight of heroin calculated on the mean value and the weight of heroin calculated on the lowest data, a difference that would be even greater between the highest and lowest of the 21 data. F G

It is trite that a chemist is a witness of fact (see *Munusamy v PP* [1987] 1 MLJ 492*; PP v Lin Lian Chen* [1992] 2 MLJ 561 and *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265). Even more than that, a chemist has certain professional skills and a knowledge in chemistry giving authority to his testimony on the weight and identity of a substance said to be a dangerous drug, such that his evidence is invaluable and apparently indispensable in a drug related trial. Yet given a special and elevated position in a drug related trial, a chemist is nothing more than a witness testifying to facts. The probative value of a chemist's evidence must yet be evaluated by a trial court, much as it would evaluate the evidence of all witnesses testifying before it. H I

That duty to evaluate witnesses' evidence is not abrogated nor abdicated to a chemist even if in coming to its findings of fact the court has

A little choice but to rely on expertise and knowledge beyond its own. Findings of fact is immutably in the court's domain, and notwithstanding the assistance of a chemist, the identity and weight of a substance said to be dangerous drugs must be the finding of a trial court and not that of a chemist.

B The court's evaluation of a chemist's evidence is infinitely more necessary where the weight of the drug concerned is bordering on or proximating a lesser offence. Conversely, it must be said that where the weight of the dangerous drug concerned is far above the minimal tariff for an offence, a detailed probe of (i) each and every step of the chemical analysis concerned; (ii) the actual calculation of weight of the substance; C and (iii) the data for the calculations concerned, thereby taking the court on an extended scientific excursion, should not at all be undertaken. This is so if, as in the case of heroin and other drugs with the same tariff, it is beyond all reasonable doubt above 15g.

On the evidence of a chemist on the identity of a suspected drug D substance, the Supreme Court (as it then was) in *Munusamy v PP* [1987] 1 MLJ 492 said at p 496:

> ... where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the E defence calls evidence in rebuttal by another expert to contradict the opinion.

That persuasion was adverted to by the Supreme Court (as it then was) in *PP v Lam San* [1991] 3 MLJ 426, and in *PP v Peter Yeah & Anor* [1993] 1 CLJ 78, Vincent Ng JC (as he then was) held at p 81 that:

> ... once the method and results of the chemist's quantitative analysis of the F random samples is conceded by the defence to be heroin, it is inherently incredible for a reasonable person to believe that from the rest of the unanalysed amount of the huge quantity of the drugs seized being 6,292.4g (gross), not more than 15g of heroin could be or was found therefrom

In not identical words, but nonetheless expressing the same sentiments, G this court in *PP v Ho Nee Fat* (Penang High Court, Criminal Trial No 47–12–1991) (unreported) in a case involving a substantial quantity of drugs, said the following:

> The weight of heroin involved in the present case is very much above 15g, and any conceivable error to SP1's (the chemist) conclusions, due to his failure to pulverize the base substance before blending, or due if any to his H less than perfect analytical method, could not possibly have affected his findings to such an extent, as would have raised a reasonable doubt that the heroin content is less than 15g.
>
> Section 37(da) provides a minimum tariff of 15g to attract the presumption, and the prosecution would have discharged its burden if it has proven beyond all reasonable doubt that the heroin (or other drug carrying I the same tariff) content in the drug exhibits weigh more than 15g (see *PP v Ang Soon Huat*; note: in that case, it was proof on a very high degree of probability).
>
> In drug related offences, the weight of drug content is an important and commanding issue; but this importance is only whether the weight is more

or less than the tariffs specified for lesser or higher offences. In offences attracting s 37(da) (which provides for a minimum weight), the need to prove the weight of drugs to be exactly and precisely that weight stated in the charge is non-existent, if it is proven beyond all reasonable doubt that the weight of drug content in the drug exhibits is above 15g. A

In borderline cases, a marginal error in the quantitative computation may be crucial. However, in cases where the amount of drugs involved is substantial and far beyond the statutory minimum, any exercise casting suspicion and uncertainty [on] chemists' findings on the weight of drugs, must ultimately fail. B

The Supreme Court decisions of *Munusamy v PP* and *PP v Lam San* on the court's acceptance of 'the not inherently incredible evidence of a chemist' were however imparted before the current benchmark of a maximum evaluation of the prosecution evidence at the close of the prosecution case (see *Khoo Hi Chiang v PP and another appeal*), that must presently translate, in a case bordering on a non-capital offence, to the court's close scrutiny of a chemist's evidence to determine if indeed the drug concerned was of a weight above the minimum tariff, notwithstanding the absence of any challenge by an accused. C D

PP v Ang Soon Huat [1991] 1 MLJ 1 was a case in point where the weight of drugs was bordering on a non-capital offence and there was a minute examination of the government chemist's evidence. It is not suggested that government chemists in carrying out the analysis of drug exhibits need necessarily adopt the analytical procedure recommended by the Department of Scientific Studies, Singapore; however, in that borderline case, the practice adopted by the government chemist in *Ang Soon Huat* was credible — Dr Chow Shui Tse who testified for the prosecution tested 18 samples taken at random from the bulk substance, but estimated the weight by weight percentage content of diamorphine on the lowest of the 18 data (see p 5) and furthermore provided the trial court with his formula in the calculation of the SD. E F

In the instant case, SP1 estimated or calculated the content of heroin on the average data, the mean value, a common sense and pragmatic approach to estimate the most probable weight of heroin in the bulk substance. It would even be said that the weight of heroin estimated on the average of the 21 data, would carry a very high degree of accuracy; yet without analysis of the bulk substance, the weight of heroin was nevertheless a theoretical calculation. G

The dichotomy in approach was therefore obvious — the chemist had a theoretical weight while the court required proof of a standard beyond all reasonable doubt for the presumption of trafficking under s 37(d), and the theoretical weight albeit with a very high probability of accuracy, was not the required proof beyond all reasonable doubt that the heroin was above 15g. Granted, the total bulk substance could not have been chemically analysed as that would have changed the character and destroyed the very drug exhibits required to be produced for a successful prosecution. Until the appearance of better methods, the current practice of estimating or calculating the weight of drugs from the data on samples tested may yet be continued. Yet an accused 'mathematically calculated to H I

A the gallows' should be given the benefit of the full range of possible weights (of drugs) which can be estimated or calculated based on the data obtained from the samples tested, and of the possible variations in and permutations to that mathematical calculation. That was certainly not so in the instant case — SP1's calculation of heroin content based on the mean value had denied the accused of a reasonable doubt that sample 17, with the lowest B percentage weight by weight content, was possibly the most representative sample of the bulk substance, and the true weight of heroin was 16.22g and not 18.15g.

The doubt on the weight of heroin as one decidedly above 15g was not diminished, but heightened, by the inconsistent evidence on the weight C of the bulk substance, for there was a difference of 5.7g in the gross weight of the package, given by SP1 as 75.7g and by SP4 as 70.0g.

In a drug related trial, where the weight of a suspected drug substance given by a chemist is different from that given by another witness, the weight given by the chemist would be preferred. A chemist is after all D trained in the sciences and equipped with the proper tools. But ever so often than not a difference in the weights, even substantial, would not matter for even taking into account the difference the drug content would still be above the minimum tariff. However, in the instant case the difference could not by ignored — 5.7g was close to 8% of 72.5g, and was the differentiating factor between a capital and a non-capital offence. E

The presence of 18.15g of heroin in the bulk substance of 72.5g meant the percentage of heroin in the bulk substance was 25.034% (dividing 18.15g by 72.5g). On the lowest of the 21 data, the weight of heroin was 16.22g with 22.372% heroin (dividing 16.22g by 72.5g) in 72.5g of the bulk substance. On the percentage of heroin of 22.372%, the unaccounted F for 5.7g should contain 1.275g of heroin (multiplying 5.7g by 22.372%). Giving to the accused the benefit of the lowest of the 21 data and the weight difference of 5.7g, the heroin content in the bulk substance would be as follows, with a resultant doubt as regards the weight of heroin being above 15g.

G (a) On the average of the 21 data

72.5g of substance and a purity of 25.034% (dividing 18.15g by 72.5g) giving the weight of heroin as 18.15g (multiplying 72.5g by 25.034%).

(b) On the lowest of the 21 data

H

72.5g of bulk substance and a purity of 22.372% (dividing 16.22g by 72.5g) giving the weight of heroin as 16.22g (multiplying 72.5g by 22.372%).

(c) Taking the lower gross weight of the package

I

66.8g (72.5g less 5.7g) of bulk substance and a purity of 22.372% (the lowest data) giving the weight of heroin as 14.944g (multiplying 66.8g by 22.372%), a weight below the tariff of 15g.

There was one other aspect in the prosecution evidence that decidedly weakened the prosecution case — the chemist analysed what he described

as orange substances while the complainant in his report and in the 'sijil serah-menyerah' described the substances recovered as brown. While minor discrepancies in the evidence of witnesses even from the same side is to be expected, yet in their description of crucial exhibits, and there is no expectation that they give replica descriptions, witnesses ought to accurately describe the exhibits as not to leave any doubt that different exhibits were involved. The identity of exhibits should not be in doubt, but in the present case there was an obvious difference in description that was not explained.

As to the repercussions on a defective description of drug exhibits, two authorities *stare decisis* on this court are definite pointers. In *Yeong Kia Heng v Pendakwa Raya* [1992] 1 MLJ 327, the Supreme Court reversed the conviction for drug trafficking and acquitted the appellant due to a defect in the identity of the substance recovered — the arresting officer said he recovered a pinkish substance while the chemist examined a reddish substance. In a press report carried by the *Sun* publication of 2 August 1995, the Federal Court in *Ng Hock Lye v PP* commutted a conviction under s 39B of the DDA to a term of imprisonment — there was doubt as to the identity of the drug exhibits as the arresting officer confirmed in his report, search list and handing over list that the drugs were purplish but the chemist who received the drugs reported the exhibits to be pinkish — and there was an admission by the learned DPP concerned that the contradiction in the description ought to have been clarified but was not.

While both decisions are binding on this court, a later decision has greater persuasion and weight. A case must be considered on the totality of the evidence; yet in giving the benefit of any doubt to an accused, minor discrepancies do not warrant any acquittal.

The court has the concession of learned defence counsel that the heroin concerned was not less than 10g, but it also has doubts, for the reasons adumbrated, that the heroin was of a weight above 15g. The prosecution has, however, made out a prima case of possession under s 12(2) an offence punishable under s 39A(ii) of the DDA and accordingly the court amends the drug trafficking charge to the following charge:

> That you at 12.03am on 6 March 1994 in front of house No 86, Jalan Kampong Rawa, Sungai Pinang, dalam Daerah Georgetown di dalam Negeri Pulau Pinang were found in possession of not less than 10g of heroin and that you have thereby committed an offence under s 12(2) of the Dangerous Drugs Act 1952 and punishable under s 39A(ii) of the same said Act.

Postscript

The above amended charge was read and explained to the accused who pleaded guilty thereto and was sentenced accordingly.

Charged amended and accused sentenced accordingly.

Reported by Pearl Wee